IN THE

Supreme Court of the United States

October Term, 1958

No. 34

WILLARD UPHAUS,

Appellant,

v.

LOUIS C. WYMAN, Attorney General, State of New Hampshire,

Appellee.

On Appeal from the Supreme Court of New Hampshire

REPLY BRIEF

ROYAL W. FRANCE,
154 Nassau Street,
New York 37, New York,

HUGH H. BOWNES,
Laconia, New Hampshire,
Attorneys for Appellant.

LEONARD B. BOUDIN,
VICTOR RABINOWITZ,
25 Broad Street,
New York 4, New York,
of Counsel.

INDEX

Cases Cited

Constitution and Statutes

Texts and Miscellaneous Materials

IN THE

Supreme Court of the United States

October Term, 1958

No. 34

WILLARD UPHAUS,

Appellant,

v.

LOUIS C. WYMAN, Attorney General, State of New Hampshire,

Appellee.

On Appeal from the Supreme Court of New Hampshire

REPLY BRIEF

I

Appellee seeks to distinguish this Court's decision in *Sweezy* v. *New Hampshire*, 354 U. S. 234, on two grounds: (1) "This case does not concern itself with the classroom" (Br. 25), and (2) "The *Sweezy* decision in part concerned questions having to do with Communist influences within the Progressive Party" (*ibid.*).

The first point bespeaks a narrow conception of education and its protection under the First Amendment. The prevailing opinions in *Sweezy* do not suggest that the only aspect of the educative process entitled to constitutional protection is to be found within the walls of a university. Indeed, the reference to Socrates in the concurring opinion

of Mr. Justice Frankfurter evokes a far broader conception of education outside institutions of formal learning.

Likewise, the reference of Mr. Justice Frankfurter to "so basic a liberty as his political autonomy," 354 U. S. at 265, cannot be deemed to be limited to the Progressive Party. It connotes a broad right of association which enjoys constitutional protection except where "the subordinating interest of the State * * * [is] compelling." *Ibid.*

Appellee also seeks to confuse the issue by his references to Communism and the "danger with which the State finds itself faced" (Br. 26)—such as the strange remark that "at least a portion of this Court recognizes the menace to the free world presented by International Communism" (Br. 27).

Communism is no more in this case than it was in *Sweezy*. Mr. Justice Frankfurter's description of Professor Sweezy could have been written about Dr. Uphaus:

> "Petitioner answered most of these questions, making it very plain that he had never been a Communist, never taught violent overthrow of the Government, never knowingly associated with Communists in the State, but was a socialist believer in peaceful change who had at one time belonged to certain organizations on the list of the United States Attorney General (which did not include the Progressive Party) or cited by the House Un-American Activities Committee * * *" (354 U. S. 234, 258).

Appellee's case references are as inapposite here as they were in *Sweezy*. They involved inquiries as to membership in the Communist Party itself. *American Communications Ass'n* v. *Douds*, 339 U. S. 382; *Lerner* v. *Casey*, 357 U. S. 468. They related to governmental facilities or employment. While we believe that even such inquiries are in violation of the Constitution, it is unnecessary to argue that matter. For appellant herein was not seeking government employment or facilities; and he did answer all

questions on communism, indicating, *inter alia*, that he had never been a Communist and had no knowledge concerning Communist Party membership on the part of speakers or guests at World Fellowship.

Appellee's present attempt to minimize the factual situation in *Sweezy* is in sharp contrast with his statement in 1957 subsequent to that decision:

> "If this were not enough, the High Court a week ago today denied the right of the legislature of New Hampshire to inquire into the actual content of a required-attendance lecture at a state university by a former professor with a substantial record of association with Communists and Communist-front organizations, who had written that violence to preserve the Soviet system was justified but that violence to preserve the Capitalist System was doubly damned * * * " *National Association of Attorneys General, Conference Proceedings* (1957) pp. 35-36.

In the instant case, as in *Sweezy*, appellee was not interested in Communist Party membership or activities. His inquiry in both cases was directed at persons who joined organizations on so-called subversive lists compiled by the Attorney General of the United States or by the House Committee on Un-American Activities.

This is shown by (1) his listing of such organizations with which appellant was connected (Br. 39-42) (Report to New Hampshire General Court, pp. 135-156) and (2) his assertion as to the "protracted and substantial record of affiliation with, support of, or membership in, repeated organizations cited as subversive or Communist-controlled by Federal Agencies on the part of named individuals who spoke at World Fellowship Inc." (Br. 6); (3) he inveighs against "the ways, wiles and devious practices of the fellow-traveller and intellectual Communist sympathizer, many of whom are far too clever (with the sanction and approval of the Party itself) to be or ever

have been an actual member of the Communist Party" (Br. 9). This is indeed a wide net.*

Appellee's sweeping charges must give way to the realities. The meetings at World Fellowship were open to everyone including appellee; there was no "conspiracy." The guest speakers were known to appellee as his own brief indicates (Br. 6). They are persons of high standing in the community, although their views may differ from those of appellee. There is no evidence that any were members of the Communist Party.** Instead, in the face of this Court's decisions in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, and *Wieman* v. *Updegraf*, 344 U. S. 183, appellee has calumniated them almost exclusively because of their association with organizations on the so-called "subversive lists" or their activities in the YMCA, as Quakers, as social workers, as conscientious objectors or for reasons undisclosed.† None of the organizations cited by

---

* One is appalled by appellee's conception of subversive activities and his indifference to constitutional right. The following is a fair example: "If we in New Hampshire or you in Texas or California, wish here to express curiosity concerning the use of money from such subtle advocates of the slanted approach as the Fund for the Republic, Inc., this is our sovereign right * * *". *Proceedings of the Conference of the National Association of Attorneys General* (1955), page 30.

** The claim is made that the guest speakers were "persons whose entire record indicates consistent support of and affiliation with Communism, from the Communist Party to Communist-infiltrated and front organizations" (Br. 33-34). This charge is untrue and unsupported by the record. What appellee really means is that some speakers were associated with groups on the lists compiled by the House Committee on Un-American Activities and by the Attorney General—quite a different matter. The charge of Communist Party membership as such appears to be made against one individual and is based upon his testimony fifteen years ago. See the appellee's Report, pages 145-146, discussed *infra* and in the Appendix.

† This appears from appellee's 1955 Report to the state legislature. Our refusal to consent to the filing of that document is explained in the Appendix to this brief.

appellee in his brief has received the type of judicial hearing which this Court in the *Joint Anti-Fascist* case indicated was a condition precedent to a verdict of guilt. In fact, no listing by the United States Attorney General has as yet received the sanction of the courts.

Appellee's argument that the guest lists are made available by statute to the sheriff's inspection is beside the point. The familiar "guest" statutes, not here involved, are not used by sheriffs to inquire into First Amendment activities. Nor do the sheriffs publish the names of guests with the resulting injury to them. Are not the guests at World Fellowship entitled to the same protection as the book purchasers in *United States* v. *Rumely*, 354 U. S. 41, the spectators in *DeJonge* v. *Oregon*, 299 U. S. 353, or the members in *National Association for the Advancement of the Colored People* v. *Alabama*, 357 U. S. 449?

II

Appellee imputes to us the argument that under *Pennsylvania* v. *Nelson*, 350 U. S. 497, no state can investigate any "subversive activities" (Br. 5). Quite aside from the difficulty of defining that much abused term, see *United States* v. *Peck*, 154 F. Supp. 603, it is not necessary for us to challenge the validity of all state investigations thus described.

Our argument is much narrower; that this particular investigation is constitutionally impermissible under the Supremacy Clause because it is directed against sedition in its commonly accepted sense, a subject preempted by the national government.

Appellee—in his own words—was proceeding under the Act of 1951 to find out "whether or not in this state there are any subversive persons or subversive groups or organizations presently in existence" (R. 10).

It would be fanciful to suggest that the Act of 1951 and the investigations made thereunder were directed

against anything but the "World Communist movement" recited in its preamble. Appellee has never claimed that he was investigating a local matter. His brief herein is replete with references to the federal statutes on the subject of international communism (Br. 16, 28, 35); such phrases appear as "the survival of all the States in a free republican form of government under the Federal Constitution" (Br. 7), "the security, welfare and protection of the Union itself" (Br. 9). We agree with appellee's statement that "National security is state security and state security is National security. A threat to one is a threat to both." *Proceedings of the Conference of the National Association of Attorneys General* (1955) page 29.

This is not a subject susceptible of state legislative action so long as the present federal statutes remain in effect. For "Congress intended to occupy the field of sedition." *Pennsylvania* v. *Nelson*, 350 U. S. 497. In *Commonwealth* v. *Gilbert*, 334 Mass. 71, the Court held that there was federal preemption even where the crime was charged as having been committed only against the State. It left open the question as to the possibility of "sedition directed so exclusively against the State as to fall outside the sweep of *Pennsylvania* v. *Nelson*". *Id.* at 75. But no one reading the New Hampshire Act of 1951, concerned as it is with international communism, could agree that it deals with matters "exclusively" against that state. As the Court said in *Gilbert*: "[T]hey are the familiar paraphenalia of Communist agitation for the overthrow of government in general, and cannot be directed separately and exclusively against the government of this Commonwealth." 334 Mass. at 74-75.

The Resolutions of 1953 and 1955 are grounded upon the Act of 1951. In *Nelson* v. *Wyman*, 99 N. H. 33, 105 A. 2d 756, the State Supreme Court stated:

> "* * * If information is acquired which points to the existence of violations of the act, by persons

known or unknown, with sufficient clarity to form a basis for decision as to future legislative action, the Legislature is to be informed. * * * Having made certain Acts unlawful and having classified certain persons as subversives by its 1951 act the legislature seeks through this investigation to secure general information as to the results of that legislation. * * * " (99 N. H. 33, 37-38)

The States' Attorneys General recognized in *Pennsylvania* v. *Nelson, supra*, that the state power of *inquiry* into sedition would be adversely affected by this Court's affirmance of the judgment of the Supreme Court of Pennsylvania.

Thus appellee herein filed a brief in this Court on behalf of the Attorneys General of twenty-five states in support of the petitioner in *Pennsylvania* v. *Nelson, supra*. He pointed out that

> "In *Nelson* v. *Wyman*, 99 N. H. 33, 105 A. 2d 756, the Supreme Court of New Hampshire rejected the contention before it that *Article IV, section 4* of the Federal *Constitution*, constituted a constitutional grant of authority to the Federal Government to preempt State anti-subversive legislation * * * " (Br. 27).

The New Hampshire Supreme Court, like appellee, has recognized that the investigation was directed against the kind of activities covered by federal legislation. In *Nelson* v. *Wyman, supra*, where the supersedure issue was raised, the State Court did not suggest that the 1951 state law was directed exclusively against local sedition. Instead it asserted "[t]he well recognized power of a state to regulate the conduct of its citizens and to restrain activities which are detrimental not only to the welfare of the State but of the Nation" (99 N. H. at 48-49).

It added:

> "If 'the menace of communist subversion' is 'in the main a danger national in scope' as contended

by the plaintiff, and may be a matter of proper federal concern, the State has an interest of its own in the preservation of its government and is not required to rely solely upon the performance by the federal government of its duty to preserve the State's republican form of government * * *." (*Id* at 50)

"So far as the circumstances of this case have required an examination of the 1951 Act, we conclude that it is constitutional upon its face, so as to furnish a basis for the resolution of 1953." (*Id* at 51)

Denying rehearing which had been sought upon the basis of the Pennsylvania case, the New Hampshire Supreme Court said:

"The enactment by Congress of the Smith Act (18 U. S. C. s. 2385) which defines and penalizes sedition and subversive activities against the governments of the United States, the states or any of their subdivisions does not preclude state legislation *on the same subject matter* * * *." (105 A. 2d 756, 769; italics supplied.)

Appellee recites many hypothetical legislative possibilities (Br. p. 5). The recital does not advance his argument since each of these techniques is directed against the international communist movement which is the subject of the many federal prosecutions under the Smith Act.

III

This is a different case from those involving the contempt power which are cited by appellee (Br. 35-36). It involves a matter of conscience, which many have recognized from time immemorial—one's natural revulsion at becoming a political informer.

"The long history of the religiously sanctioned opposition to informing and the betrayal of confi-

> dences when it is fully written will help us to understand the present conflict of the conscience on the matter of disclosing names. Even the present survey will sufficiently indicate such a geographical and chronological extent and persistent intensity of opposition to informing on friends and associates that one will be convinced that some fresh demarcation of the boundary between responsible divulgence and conscientious reticence must be drawn by the religious and other voluntarist groups on the one hand and on the other by the courts. An obscure and only partly explored frontier of the conscience of the responsible democratic citizen must be resurveyed. It is apparent that something very vital in the basic tissue of human relationships is in jeopardy." Williams, *Reluctance to Inform*, XIV *Theology Today* (1957) 229, 234-235.

See also *The Universal Jewish Encyclopedia*, Vol. 5, pp 564 *et seq.*; *The Jewish Encyclopedia*, Vol. 9, pp. 42-44.

Therefore, this is not the ordinary case of the refusal of a witness to answer a question put in the course of criminal or civil litigation. Instead, appellee seeks here to compel appellant to violate well-recognized conscientious principles. This attempt to force appellant to choose between his conscience and imprisonment for life does represent a most cruel punishment. Men of conscience have always preferred to suffer penalties rather than inform upon others. That appellant's feelings are more than justified by the facts in this case, is illustrated by the use made of such information by the Attorney-General in his report to the Legislature where he lists numerous persons who are completely innocent of wrongdoing. These persons, in current parlance, have now been "cited" in New Hampshire.

The warning of the Court of Appeals for the Ninth Circuit is most relevant here in considering the choice offered appellant:

> "* * * it is not amiss to bear in mind whether or not we must look forward to a day when substantially every one will have to contemplate the possibility

that his neighbors are being encouraged to make reports to the FBI about what he says, what he reads and what meetings he attends * * *." *Parker* v. *Lester*, 227 F. 2d 708, 721.

Respectfully submitted,

ROYAL W. FRANCE,
154 Nassau Street,
New York 37, New York,

HUGH H. BOWNES,
Laconia, New Hampshire,
Attorneys for Appellant.

LEONARD B. BOUDIN,
VICTOR RABINOWITZ,
25 Broad Street,
New York 4, New York,
of Counsel.

November 1958.

APPENDIX

THE STATE OF NEW HAMPSHIRE

ATTORNEY GENERAL

CONCORD

October 31, 1958

Leonard B. Boudin, Esq.
Rabinowitz & Boudin
25 Broad Street
New York 4, New York

Re: Uphaus v. Wyman—No. 34

Dear Mr. Boudin:

Enclosed you will find two copies of the excerpts from the Attorney General's Report of January 5, 1955 referred to in our brief relating to Willard Uphaus and World Fellowship, Inc.

If you have no objection, we will file the required forty copies with the Court and refer to the same during oral argument.

Please notify me of your decision in this regard at the earliest possible date.

Sincerely,

DORT S. BIGG.
Dort S. Bigg

Encs.
DSB/m
CC—Royal W. France, Esq.
154 Nassau St.
New York 4, N. Y.
Hugh H. Bownes, Esq.
Laconia, N. H.

November 6, 1958

Dort S. Bigg, Esq.
Office of the Attorney General
The State of New Hampshire
Concord, New Hampshire

Re: Uphaus v. Wyman—No. 34

Dear Mr. Bigg:

Mr. Boudin and I have given further thought to your request to be allowed to file forty copies of the report of Attorney General Wyman to the New Hampshire General Court with reference to World Fellowship and Willard Uphaus.

In one sense we should be happy to have this record before the Court since it so clearly demonstrates what we have contended, that Mr. Wyman's inquiry was not directed toward Communism or attempted overthrow of government by force and violence, but toward persons of liberal or unpopular opinions whose rights are protected by the First Amendment.

We cannot, however, consent to the submission of a document which is so full of misstatements of fact and refers to prominent American liberals in a way which, if this were not a privileged communication to the legislature, would constitute libelous matter.

The document is full of such misstatements. Some people are named as having been present at World Fellowship who were never there. Other people are listed as belonging to organizations or participating in activities in which they did not engage. An example of the looseness of statement in the report is the reference to me in which I am listed as having been affiliated with or supported organizations I have never heard of. Some of the connections attributed to me were as counsel in litigation. I am Executive Director of the National Lawyers Guild, of which I am proud, and I consider the Attorney General's reference to this

organization to be a good example of the vice of the report. The National Lawyers Guild did come under attack by the Attorney General of the United States but his attempt to list it was withdrawn after the institution of litigation with the statement by the present Attorney General that it could not be supported by the necessary evidence.

Further evidence of the character of the report is contained in the references to such well known liberals or religious leaders as Reverend Lee H. Ball, Clifford J. Durr and his wife, Florence Luscomb, Reverend Dryden Phelps and others and in the reference to Professor Struik whose case has been dropped and who is a teacher in good standing at the Master Institute of Technology. The list of persons on page 155 of the report, some of them representatives of foreign governments, teachers or religious leaders, without any indication as to why they are mentioned, is a further example of the dangerous use which Mr. Wyman can make of names. These persons may now be further calumniated upon the basis of having been "cited" to the General Court of New Hampshire.

While for the foregoing reasons we cannot give the requested consent to the filing of the report, we shall not raise any formal objection.

Sincerely yours,

ROYAL W. FRANCE.
Royal W. France

RWF:se